

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH
COMPANY

EDISON

Application for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406.1 of the Illinois Public Utilities Act, and an Order pursuant to Section 8-503 of the Illinois Public Utilities Act, to Construct, Operate, and Maintain a new 345 kilovolt transmission line in Ogle, DeKalb, Kane and DuPage Counties, Illinois

Docket 13-0657

REPLY BRIEF ON REHEARING

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and Ellen Roberts Vogel,

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Michael Petersdorf, Sarah Petersdorf, and Ellen Roberts Vogel (together, the “SP Parties”), file their Reply Brief on Rehearing in the above-referenced proceeding.

I. Introduction

Initial Briefs of ComEd, Staff, and the SP Parties all argue for the same result - the reaffirmation of the Approved Route in the vicinity of the Muirhead Springs Forest Preserve. Only the so-called Muirhead Group¹ argues for a different result, relying heavily on factual averments without citation, which either do not appear in, or contradict, the record. In the end, this Commission can only reach the conclusion that the Approved Route should be reaffirmed. This is because the restrictions on the Muirhead Springs Forest Preserve are enforceable – or at a minimum would take an inordinate amount of time, in light

¹ Cash's leveraging of the Muirhead name is again noted, and its appropriateness questioned, but for the sake of simplicity and consistency between various parties' briefs, Cash's group will be referred to in this brief as the Muirhead Group (“MG”).

of ComEd's schedule, to judicially-declared ineffective. Further, utilizing the Commission's twelve-factor analysis, the Approved Route remains superior, even if the restrictions were not an issue.

II. Restrictions/Dispute

A. Grantors Imposed Restrictions in Deeds That Were Clear and Unambiguous

The Muirhead Group ("MG") twists the facts in their favor in their Initial Brief concerning the deed restrictions, offering only meager evidence in their attempt to support their position. First, citing a single answer Monica Meyers gave at the hearing on cross-examination by Mr. Cash's attorney, MG contends that the prior owners of the parcels in question did not place any restrictions on the use of the properties. MG IB on Reh'g, p. 5. The weakness of the evidence in support of this MG contention is best shown by quoting the portion of Ms. Meyers' testimony referenced above and relied upon exclusively:

Q: At the time you purchased the property, did the family indicate they wanted to place any restrictions on the Forest Preserve's use of that property?

A: No.

MG I.B. on Reh'g, p. 5; Tr. 88:12-16.²

Ms. Meyers' answer cannot be relied upon to support a finding that the grantors in 2003 did not restrict the use of the conveyed properties. First, the testimony is utterly lacking in necessary detail on which to base such a finding. We do not know who in the "family" had any communication with Ms. Meyers at the time. We do not know what "time" is being referenced – whether it was at the signing of the deeds and closing of the conveyances, or some earlier time when the

² SP Parties' hearsay objection was overruled. Tr. 88:17-21.

conveyances may have been discussed, or some later time. Or perhaps Ms. Meyers' answer means simply that she did not receive any indication from "the family" that they wanted to place any restrictions, thereby meaning that the family somehow had a duty to inform Ms. Meyers that they wanted the restrictions, and that silence, therefore, implies no restrictions were desired.

More important than the flimsiness of the testimony MG relies upon to support their contention, however, is the fact that their contention is directly contradicted by the documentary evidence in the record. It is uncontroverted that the deeds themselves show on their face that the grantors included restrictive language in at least two of the three original deeds. In the deed by which Muirhead Hui, LLC conveyed property to the FPDKC, for example, the following restrictive language was included in the "SUBJECT TO" section of the deed:

and (f) the following use restriction and covenant:

The real property described herein must be maintained for public outdoor recreation use purposes only as prescribed by the State of Illinois, Department of Natural Resources under terms of the State's Open Space Lands Acquisition & Development (OSLAD) grant program and shall not be sold or exchanged or have other encumbrances places (sic) on the title, in whole or in part, which divests control or interest in the property to another party without prior approval from the State of Illinois, Department of Natural Resources or its successor.

ComEd Ex. 38.02, pp. 4-5.

This language (subsequently unilaterally crossed out by hand by the FPDKC) appears in the body of the original deed, above the date (Sept. 19, 2003), grantor signature and notarization. Similarly, in the deed by which several of the

Muirhead family members³ conveyed another parcel to the FPDKC, the body of the deed included: “FURTHER SUBJECT TO: the Declaration of Use Restriction and Covenants attached as Exhibit A.” *Id.* at 19. Exhibit A, in turn, contains a use and restriction covenant identical to the one quoted above that was part of the Muirhead Hui, LLC conveyance. *Id.* at 22.

ComEd witness and real estate title expert Susan Woods testified that the above-quoted restrictions were part of the original deeds. ComEd Ex. 38.0 CORR., 3:50-60. Counsel for MG did not challenge her testimony on this point. Michael Petersdorf, whose wife, Sarah, is Robert Muirhead’s daughter and a Manager and Member of the Muirhead Hui, LLC, testified that the restrictions, “were an integral part of the property transfers, partly in order to protect our remaining acres and improvements, most importantly our Frank Lloyd Wright-designed Farm House.” Petersdorf Response Testimony, Petersdorf Ex. 2., 3:44-46.

The fact that the above-described deed restrictions imposed by the grantors were similar in wording to restrictions imposed by the IDNR does not detract from their legal effectiveness. It is enough that the grantor restrictions were an integral part of the deeds, applicable to the properties conveyed, were not released by the grantors, and by their terms would prohibit construction of the GPG transmission line on the properties. No one has suggested the restrictions language is ambiguous; rather, everyone agrees that the language, if given effect, serves to prohibit a transmission line. All other extrinsic or extraneous

³ Robert C. Muirhead, Margaret M. Marcom, Ruth M. Carraway, Jean E. Peacock, and Mary R. Muirhead

“evidence” offered in an attempt to negate the clear language of the deeds is of no import. Parol evidence is inadmissible to interpret, especially to change the terms of, the four corners of the clear and unambiguous deed instruments. The principal function of a court in construing a written instrument is to give effect to the intention of the parties as expressed in the language of the document when read as a whole. Where the language is clear and definite, there is no need for judicial interpretation. *Sol K. Graff & Sons v. Leopold*, 92 Ill.App.3d 769, 416 N.E.2d 275, 277 (1st Dist. 1981) (provisions of a real estate lease prohibiting signs were not ambiguous). The grantor restrictions in the subject deeds are clear and definite.

MG also has not alleged the essential elements required for a reformation of the deeds. Specifically, Illinois law requires that, for a court to find reformation an appropriate remedy applicable to a written instrument, the party seeking reformation must prove by clear and convincing evidence that the parties had a clear and actual meeting of the minds which the written instrument does not accurately reflect. *LaSalle Nat’l Bank v. Kissane*, 163 Ill.App.3d 534, 516 N.E.2d 790, 793 (1st Dist. 1987). MG has neither argued for reformation of the deeds nor alleged, let alone proved, facts sufficient to support such a remedy.

B. Even the Separate IDNR-Imposed Restrictions Have Not Been Released or Negated

The three deeds in question and ancillary documents that were reproduced in ComEd Ex. 38.02 also contained restrictions on use imposed by IDNR, apparently as a condition of the grants to the FPDKC. See ComEd Ex. 38.02, pp. 7, 25, 39. The evidence shows, however, that when the IDNR

released the FPDKC from utilizing the grant proceeds on the southern portions of the properties, outside of the northern 200 acres, the IDNR did not release the southern properties from the use restrictions. Nothing in the letters from the FPDKC to the IDNR included a request for such relief, and nothing in the responding letters from the IDNR granted such a release. *Id.*, pp. 9-13, 27-31, 41-45. That is likely why ComEd witness Ms. Woods testified that the IDNR could still possibly enforce the IDNR-imposed restrictions. Woods Supp. Direct, ComEd Ex. 38.0 CORR., 4-5:104-105.

C. The Illinois Grant Manual Offers No Help to MG

In their Initial Brief, MG also contends that the grantors of the properties in question were required to transfer “clear fee simple title” to the FPDKC. MG IB at 5. Counsel for Mr. Cash was able, over the objections by ComEd and SP Parties, to have admitted a voluminous document entitled, Illinois Outdoor Recreation Grant Programs OSLAF/LWCF, 2014 Local Participation Manual (“Grant Manual”). Cash Cross Ex. 3. In his cross examination of Ms. Meyers, counsel for Cash selectively picked out a single provision that states, “No land rights or reservations can be retained by the seller unless approved by the DNR.” Cash Cross Ex. 3, p. 23. Neither the FPDKC nor MG offered the version of the Grant Manual in effect when the properties were conveyed and grants received, instead relying on a version that is ten years removed from the relevant time period. Even assuming, however, that the quoted provision also appeared in the version in effect ten years earlier, the provision does not render the grantor-imposed restrictions nullities or otherwise negate their effectiveness. When the local

agency requesting a grant (*i.e.*, FPDKC) sends its billing request to DNR for grant reimbursement, the agency is to include a copy of the recorded deed. Cash Cross Ex. 3, p. 24; *see also Id.*, pp. 13, 14 (agency to provide commitment for title insurance or other device that identifies property encumbrances; copy of property deed must be filed with DNR as part of the application).

Here, the restrictions language imposed by the grantors on two of the three properties in question was identical to that imposed by the IDNR. Also, presumably the IDNR saw, and it certainly had notice of, the grantor-imposed restrictions when the FPDKC provided the deeds. The record does not show whether the FPDKC provided a title commitment, so we cannot confirm that any title commitments at the time noted the grantor-imposed restrictions as exceptions. It is logical that the IDNR would have approved of the grantor-imposed restrictions, based on their similarity to those imposed by the IDNR itself. Nevertheless, the fact that the grantor-imposed restrictions were present and not released makes them effective today, even if, *arguendo*, they were in technical violation of a grant guideline. The remedy, if any, for such a technical violation, was to deny or require a return of the grant, and not to render the grantor-imposed restrictions no longer effective.

III. Rehearing Routing Alternatives are Inferior to the Approve Route

Applying the facts in the record to the Commission's twelve-factor analysis, the Approved Route is least-cost compared to the FPDKC Adjustment and the ComEd Conditional Rehearing Alternative. *See*, Order, p. 35-36; Order,

pp. 14-15, *Ameren Ill. Transmission Co.*, Docket 12-0598, Order pp. 14-15 (Aug. 20, 2013) (providing the twelve factors).

In its Initial Brief, MG argues all of the twelve-factors, except Community Acceptance. In doing so, MG strongly advocates routing structures, that can/will support three high-voltage circuits, through the middle of a town. MG I.B. on Reh'g, p. 2. This fact, alone, calls into question MG's ability to meaningfully apply the factors. The apparent misunderstanding of what constitutes least-cost exacerbates this concern. While MG has suggested that the dollars and cents cost of construction is what constitutes "least cost,"⁴ it is a balancing of all twelve-factors in the test that determines what is least cost. Finally, the fact that MG commingles various factors, e.g. utilizing the railroad corridor in nearly every factor, rather than the one it belongs, "presence of existing corridors," calls its analysis into question. The table below, summarizing argument that follows, demonstrates that the Approved Route is overwhelmingly superior under the test.

Factor	Application
Length of Line	Slightly favors FPDKC and ComEd Conditional Rehearing Alternative over Approved Route by being a "sliver" shorter
Difficulty and Cost of Construction	Favors the Approved Route as the record shows that constructing along a railroad is more difficult and cost-savings are uncertain and unlikely to actually be attained
Difficulty and Cost of Maintenance	Favors the Approved Route as the record shows that constructing along a railroad is more difficult
Environmental Impacts	Favors the Approved Route as the Approved Route avoids Forest Preserve property while the other routes bisect it
Impacts to Historical	Favors no particular routes. All routes impact one

⁴ MG I.B. on Reh'g, p. 4 (mischaracterizing Mr. Naumann's testimony as stating that the least cost route is the FPDKC Adjustment, not noting that Mr. Naumann is only commenting on the costs of constructing the various routes).

Resources	historical resource
Social and Land Use Impacts	Favors the Approved Route, which avoids land set aside for all of the people of Kane County
Number of Affected Landowners and Other Stakeholders	Falls in favor of ComEd's Conditional Rehearing Alternative, followed by the Approved Route. Disfavors the FPDKC Adjustment
Proximity to Homes and Other Structures	Falls in favor of the Approved Route as it impacts fewer homes and non-residential structures
Proximity to planned or existing development	Disfavors the FPDKC Adjustment as it runs through the middle of Plato Center
Community Acceptance	Not commented on in this brief, but in the SP Parties' Initial Brief (pp. 12-13) indicates that this factor favors the Approved Route.
Visual Impact	Favors the Approved Route as the most people would actually see the ComEd Conditional Rehearing Alternative and FPDKC Adjustment
Presence of Existing Corridors	Possible ⁵ advantage to the FPDKC adjustment, but disfavoring the ComEd Conditional Rehearing Alternative.

Table 1 – Twelve-Factor Analysis

A. Length of Line

It is true that, of the three routes being considered by the Commission at this time, the FPDKC and ComEd Conditional Rehearing Alternatives are slightly shorter. In the words of the original Order in these proceedings though, the difference in lengths is only a “sliver of the Project’s 60-mile length.” Order, p. 34. As such, while favorable to these routes, such advantage should be given appropriate weight.

B. Difficulty and Cost of Construction

The record reflects that: (i) it is more difficult and complicated to construct a transmission line along a railroad than open ground; (ii) it is unlikely that any cost-savings will result from swapping the Approved Route for the FPDKC

⁵ Assuming the Commission favors railroad corridors over utilization of section and parcel lines.

Adjustment or the ComEd Conditional Rehearing Alternative; and (iii) even if there were savings, they would be outweighed by impacts to homes. As such, this factor falls squarely in favor of the Approved Route.

MG alleges that the FPDKC Adjustment is the “least complicated route.” It fails to cite to the record for such a proposition. If the record is reviewed, though, it is apparent that the opposite is true. Constructing near a railroad requires ComEd to undertake an “inductive coordination study, and work with the railroad to mitigate the effects that the [transmission line] may have on the safe operation of the railroad.” Kaup Dir., ComEd Ex. 6.0, ll. 220-222; Kaup, Tr. 127:18-19 (“in a lot of ways it may be harder to construct along a railroad”). Indeed, the record suggests that constructing a transmission line next to a railroad is more complicated than constructing one on open ground.

While it is true that, for the most part, no particular factor is to be given priority over another,⁶ the Commission has established that impacts to residences is of greater importance than costs of construction. *In re Ill. Power Co. d/b/a Ameren IP & Ameren Ill. Transmission Co.*, Oder, p. 16 Docket 06-0179 (May 16, 2007). Thus, even if cost saving of \$1.4 million to \$3.1 million were recognized, the impact to homes, discussed later, outweighs this factor. As such, any theoretical savings should be discounted. However, those potential savings are simply unlikely.

As ComEd pointed out in its brief, “slight” cost savings do not include added real estate costs or litigation risks. ComEd, I.B. on Reh’g, p. 2. ComEd

⁶ Order, p. 35.

apparently believes that “cost of acquiring the necessary land rights. . . and cost of litigation, . . . could easily consume the theoretical savings.” ComEd I.B. on Reh’g, p. 9. Vogel and the Petersdorfs agree.⁷

Finally, MG feigns concern that this Commission may “approve a more expensive route to be borne by ratepayers.” MG I.B. on Reh’g, p. 4. If MG was truly concerned about costs to be borne by ratepayers it would recognize that ratepayers have *already* more than lost out on potential savings because of the delay resulting from it sitting on its hands in the initial proceedings. See, ComEd I.B. on Reh’g, p. 9 (indicating that even assuming construction costs of \$3.1 million dollars less for the FPDKC, such savings are lost to the ratepayers in a mere 15 days, or less time than it took to get MG to comply with its discovery obligations).

C. Difficulty and Cost of Maintenance

Difficulty and cost of maintenance, likewise, falls in favor of the approved Route. Maintaining a transmission line near a railroad can be more difficult as well, given one concern of construction, access, would be the same for maintenance as it would be for construction. Kaup, Tr. 127:18-19 (“in a lot of ways it may be harder to construct along a railroad”).

D. Environmental impacts

It is apparent that the environmental impacts factor falls in favor of the Approve Route’s utilization. As MG recognizes,⁸ the FPDKC Adjustment and the

⁷ Staff seems to suggest it can only guess that the route may be less costly based solely upon the appearance that the route is shorter. Staff I.B. on Reh’g, p. 4.

⁸ MG I.B. on Reh’g, p. 7.

ComEd Conditional Rehearing Alternative both run directly through a Forest Preserve. Dissimilarly, the Approved Route does not touch any forest preserve property. While environmental disturbances may, purportedly, be mitigated, it must go uncontroverted that there is a *greater* impact to environmentally protected Forest Preserve property by swapping the Approved Route for another route that actually crosses Forest Preserve property. See FPDKC Resolution No. FP-R-14-02-2276 (filed Feb. 14, 2014) (“the project may have adverse environmental impacts, . . . and adverse impacts on natural areas and resources.”). This Commission, in this very docket, has rejected routes that “relocate the Project from commercial agricultural land . . . onto sensitive Forest Preserve property.” Order, p. 34 (emphasis added).

E. Impacts on Historical Resources

This factor is a wash. The FPDKC Adjustment and ComEd Conditional Rehearing Alternative both impact a historically significant structure a Frank Lloyd Wright farmhouse. See, SP Parties’ I.B. on Reh’g, p. 12 (indicating that the home is a Kane County Landmark and is a recipient of the Richard Driehaus Foundation Award for Rehabilitation). The Approved Route impacts a archeological site, *but* that site can be spanned.⁹ MG I.B. on Reh’g, p. 7. Even viewed most favorably to MG, this factor amounts to a wash.

F. Social and Land Use Impacts

⁹ Notably, MG, again, makes a factual averment with no citation to the record by claiming that spanning will “necessarily add to the total cost of the project.” This allegation must be ignored as spans of 700’ are included in costs, and there is no reason in the record to believe that this standard span will not prevent impact to the historical resources.

This factor falls squarely in favor of the Approved Route. The MG Initial Brief on Rehearing utilizes the general, repeated, intimation that utilization of the railroad corridor is the cure for all that ails this project in this area. However, the FPDKC Adjustment and the ComEd Conditional Rehearing Alternative both run through land owned by the Forest Preserve District of Kane County. It once opposed this, stating that the project “may have adverse social and land use impacts.” FPDKC Resolution No. FP-R-14-02-2276 (filed Feb. 14, 2014). The Approved Route avoids all of these impacts by avoiding: (i) an area of land set aside to “preserve natural areas,”¹⁰ (ii) a town, (iii) a school, and (iv) several athletic fields. Instead, it lays upon land that is farmed by tenant farmers for out-of-county or out-of-state owners.

G. Number of Affected Landowners and Other Stakeholders

This factor falls in favor of the ComEd Conditional Alternative, followed by the Approved Route. It disfavors the FPDKC Adjustment. See Murphy Dir. (Reh’g), ComEd Ex. 36, p. 5. MG, ignoring the factor reading “*number* of affected” not “*nature* of affected,” shrugs off the fact that the FPDKC Adjustment impacts a greater *number* of people. Instead MG tries, again, to commingle factors – bringing in the railroad corridor, which has its own factor. This opportunity is its own factor, but as to this factor, the *number* of affected landowners and stakeholders, the FPDKC Adjustment falls flat.

H. Proximity to Homes and Other Structures

¹⁰ FPDKC Resolution No. FP-R-14-02-2276 (filed Feb. 14, 2014).

This factor falls directly in favor of the Approved Route. Again, MG ignores the drastic increase in homes and non-residential structures being impacted. See MG I.B. on Reh'g, p. 15. Instead, it inappropriately commingles factors, attempting to muddy the waters. As mentioned above, the Commission has seen fit to point out that impacts to homes, like the fifteen impacted by the FPDKC Adjustment, are of a greater importance than at least one other factor. See *In re Ill. Power Co. d/b/a Ameren IP & Ameren Ill. Transmission Co.*, Oder, p. 16 Docket 06-0179 (May 16, 2007).

I. Proximity to Existing and Planned Development

This factor disfavors the FPDKC Adjustment. Nothing in the record suggests that any route has currently planned development. See, e.g., Tr. 116:21-117:1 (indicating that Cash has no firm plans to develop his property). As such, planned portion of this factor favors no particular route. However, the FPDKC Adjustment runs right through Plato Center, placing the route in proximity to a great deal of existing development.¹¹ MG I.B. on Reh'g, p. 8.

J. Community Acceptance

No other party commented on community acceptance in their Initial Briefs, and as such, it would be improper to re-assert the arguments made in the SP Parties' Initial Brief here.

K. Visual Impact

The visual impact factor favors the Approved Route. MG intimates that the visual impact of the Approved Route is worse when it states that it "border[s]

¹¹ Again, the "Muirhead Group's" response to this major problem is that the separate factor of utilization of an existing corridor mitigates this issue. MG I.B. on Reh'g, p. 8.

the Muirhead Forest Preserve on three sides.” MG I.B., p. 9. This statement suggests a parcel of land almost surrounded. However, by calculating sides in the manner it chose to, MG should have mentioned it was three, out of more than two-dozen, sides and, further, that one of those sides is shared by *all* of the routing alternatives.

Visual impact requires humans to see the line. MG ignores the fact that the land crossed by the Approved Route is farmed, not lived on¹² and the portion of the Forest Preserve property near the Approved Route is farmed.¹³ Dissimilarly, individuals and visitors to the historic Frank Lloyd Wright home, or living and working in Plato Center, will see large transmission line structures rising from the ground. As such, visual impact favors the Approved Route.

L. Presence of Existing Corridors

MG repeatedly references the utilization of the railroad corridor throughout its Initial Brief. However, this Commission, in this very docket, accepted routes that deviate from the railroad corridor while rejecting alternatives that parallel the railroad but traverse Forest Preserve property. See, e.g. Order, pp. 29, 34 (rejecting the Kenyon/Deutsch combined alternative). Further, the Approved Route follows existing section/property lines. Murphy Dir. (Reh’g), p. 7. Finally, the ComEd Conditional Rehearing Alternative bisects properties, unlike the Approved Route. MG I.B. on Reh’g, p. 9. As such, insofar as this Commission may believe a railroad corridor to be a superior existing corridor to section and parcel lines, the FPDKC Adjustment may have a slight advantage, but the

¹² Sans one home greater than 500 feet away.

¹³ Based upon the maps appearing in the record.

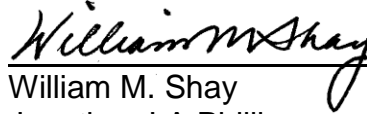
Approved Route remains superior to the ComEd Conditional Rehearing Alternative.

IV. Conclusion

As a threshold issue, it is inappropriate to consider the routing alternatives on rehearing. However, even if they are considered, the adjustments proposed on rehearing rely upon land that is unavailable for ComEd to construct the line upon. Further, all of these routing adjustments are inferior to the Approved Route when examined under the Commission's twelve-factor analysis. As such, this Commission should maintain the *status quo* and find, again, that the Approved Route is the appropriate routing in the area of Muirhead Springs Forest Preserve.

Respectfully submitted,

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A handwritten signature in black ink, reading "William M. Shay", is written over a horizontal line.

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